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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1984

Cameo Convalescent Center, Inc.

Petitioner,

v.

Terry Willkom,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

This Petition for Review concerns two pieces of litigation that arose out of the same operative core of facts. The first, Cameo Convalescent Center, Inc. v. Senn, et. al., 738 F.2d 836 (7th Cir. 1984), cert. denied sub nom. Percy v. Cameo Convalescent Center, 84-505, and

Cameo Convalescent Center v. Senn, 84-680. Terry Willkom, the agency's Deputy Secretary at the time of the nursing home investigation which gave rise to the dispute, was not a party in Cameo. The district court had rejected a belated attempt to add him in that action. (Pet. 6, note 4.)

Cameo commenced a separate action against Willkom. The District Court for the Western District of Wisconsin rendered a summary judgment in Willkom's favor which was upheld by the court of appeals. It is that decision which this Petition addresses.

FACTS

The petitioner's statement of facts contains inaccuracies and misstatements of the events that are relevant to this action.

1. The judgment entered by the district court was a summary judgment and findings were issued. (Pet. 11A.-18A.)

2. Willkom's job functions included making decision whether particular litigation should be terminated. (Pet. 40A.) Although his usual activities did not involve direct involvement in the lower level proceedings initiating the regulatory processes, there is no evidence that Willkom's usual job functions did not involve decisions about whether enforcement actions could continue. (N. 7, finding 18; Pet. 17A.)

3. As of the time of the filing of the complaint, Terry Willkom was no longer the deputy secretary of the department (Pet. 27A.)

4. Contrary to the Petitioner's statement, the record does not indicate

what Fiss did or with whom he consulted. (Pet. 38A.)

5. Willkom was the superior of Fiss and of the administrator. He was the person "up the ladder" (Pet. 37A.) who could make the prosecutorial decision. (Pet. 28A. (par. 9; Pet. 29A. par. 11.) The record indicates that Willkom had the authority to continue the prosecution. Mr. Van de Grift testified that he had no authority to decide if the prosecution should continue. (Pet. 37A.)

6. The record only indicates that an attorney expressed his opinion that some of the charges (NOVs) were not with probable cause. (Pet. 37A.) It was not Willkom's firm opinion that the NOVs were without merit. (Pet. 41A.; Resp. Ap. 22A.)

7 There was no evidence that Willkom believed the actions of the

charging nurse-surveyor were malicious. (Pet. 3A.)

8. At the time of the actions alleged as to Willkom there were appeals by Cameo pending in the administrative procedures.

9. The statute, which at that time provided for a Suspension of Referrals Listing (SORL), also provided for a hearing prior to its issuance if the nursing home appealed. (Pet. 4.) Within a few days after the listing of Cameo, a correction was made and sent out removing Cameo's name from the list. Willkom had no part in the incorrect listing. (Finding 15.)

10. It is speculation whether the listing would have occurred if there had been no administrative proceedings continuing against Cameo. The continued regulatory enforcement and the suspension

of referrals were separate and distinct actions with separate processes. (Pet. 4.) As Petitioner asserts (Pet. at 7, p. 2), after the notice of appeal Cameo should not have been placed on the Suspension of Referrals List (SORL).

11. Prior to the initiation of any of the enforcement actions, and at the time of the survey [inspection] that gave rise to all of these proceedings, Cameo was advised of the findings of the nurse-surveyor [investigator] and was given an informal opportunity to respond. The statutes further provided for elaborate formal hearings (Pet. 4, Resp. Ap. 9A.-10A.) which as the Petitioner states, were then pending. (Pet. 7.)

12. The listing on the SORL did not prevent general admissions to the nursing home but only limited

referrals from Wisconsin county agencies. (Pet. 4.)

13. The March 26, 1979 meeting between Willkom, Van de Grift, and Wagner was a general discussion of enforcement of nursing homes regulations. The "political" question did not involve Cameo specifically. (Resp. Ap. 11.) It involved the intent of legislators as to the need for hearings. Legislators pressured the Department for strict enforcement. (Pet. 42A.)

14. At the time of the March 26 meeting, Willkom did not consider the NOVs unsupportable. (Pet. 41A.) He felt that whether there was support for a charge was a matter of opinion and concluded that the appropriate method to resolve this dispute was with the applicable procedures. (Resp. Ap. 19A.)

15. The March 26 meeting was a discussion whether the administrative action should continue. Willkom said yes and, as alleged in the complaint at paragraph 17 (Pet. 31A.) ordered the action to continue.

> Defendant Willkom, however, ordered that these Notices of Violation should be pursued through the Administrative Hearing process by the Department. . . .

16. Wagner, an attorney agreed the administrative processes should continue. (Pet. 2A.)

17. Willkom believed that the hearing process was the best way to resolve the issue whether the NOVs were supportable or not. (Resp. Ap. 210-211, 213, 231-232.)

18. Despite the Petitioner's contrary assertion, there is no evidence that Willkom's decision was the result of any political pressure specific to Cameo.

ARGUMENT

I. THERE IS NO REASON TO GRANT CERTIORARI

The Petitioner contends that there were issues left unresolved by this Court's decision in Butz v. Economou, 438 U.S. (1978) that were not addressed by the decision of the Seventh Circuit Court of Appeals. Those are alleged to be the nature of the governmental duties and the degree of checks on agency zeal, which Petitioner Cameo contends must be established in order to allow prosecutorial immunity; and whether the particular official was acting in a prosecutorial role. Petitioner Cameo appears to contend that the determination whether the functioner is a prosecutor is to be made with reference to some standard of "usual" job duties rather

than by a determination whether the particular actions for which the protection is claimed were prosecutorial in nature.

II. THE ACTIONS OF THE OFFICIAL WERE PROSECUTORIAL AND ENTITLED TO IMMUNITY

In Harlow v. Fitzgerald, 457 U.S. 800, 811 (1982), this Court held the provision of prosecutorial immunity was to be done through a "functional" approach. The court of appeals also applied a "functional approach" (Pet. 5A.) in concluding that the functions and duties performed by Willkom were "functionally comparable" to the duties of a prosecutor under the Butz v. Economou analysis.

Petitioner Cameo, however, contends that Willkom is not entitled to immunity because his "usual" functions did not

involve prosecution. As indicated above, Petitioner Cameo's factual assertions for this contention are weak; but even assuming that the "majority" of Willkom's duties did not involve prosecution, the record clearly shows that his duties included decisions on the continuance of administrative prosecutions.

The court of appeals and the district court concluded that the decision whether a prosecution should continue is a prosecutorial decision and that the maker of such a decision acted functionally as a prosecutor and was entitled to immunity.

Petitioner Cameo asserts that, because Willkom may have had other duties, and may even have had more non-prosecutorial duties than prosecutorial duties, he was not entitled to the immunity.

A prosecutor, such as a district attorney or an attorney general, will frequently have many duties other than those which may be functionally prosecutorial in nature, and such a person may delegate or leave many decisions to subordinates and only act in certain cases or when asked. In such instances the district attorney or attorney general is still a prosecutor, and entitled to immunity for the prosecutorial decisions. In Gravel v. United States, 408 U.S. 606 (1972), this Court noted that senators and their aides might be absolutely immune for some actions and not immune for others.

That an executive official may have other duties that do not involve prosecutorial duties, even a majority of such duties, does not diminish the right of such a person to claim prosecutorial

immunity when performing duties that are "functionally" prosecutorial. This is particularly so where, as here, the particular decision is within his power and he in fact exercises the decision. The record indicates that Willkom had the authority to continue the prosecution, and that he "ordered" it to continue.

Petitioner Cameo's attempt to rely on Harlow v. Fitzgerald is aside the mark. In Harlow v. Fitzgerald, there was no assertion that anyone had acted in a prosecutorial fashion, and this Court was considering fresh whether presidential aides, as aides, were entitled to absolute or qualified immunity. This Court has already concluded that public policy is served if persons who act in a way "functionally" like a prosecutor are afforded immunity. No balancing is required to reach this conclusion anew;

it is only necessary, as the court of appeals did, to determine if the actions for which the protection is claimed are prosecutorial.

Both the district court (Pet. 21A.) and the court of appeals concluded that Willkom's action were prosecutional. Petitioner Cameo does not appear to contend that the decision to continue the prosecution was not prosecutorial, but contends that on some sort of averaged basis a majority of other duties of Willkom's were non-prosecutorial. The approach of Petitioner Cameo was rejected in Gravel v. United States and in Harlow v. Fitzgerald.

Curiously Petitioner Cameo now asserts that Willkom did not actually order that the prosecution be continued, but that he merely "influenced" the continuation. In its complaint

Petitioner Cameo alleged that Willkom "ordered . . ." (Pet. 31A.) that the Notices should be pursued through the administrative process. The district court found that Willkom "rejected any notion of dropping the prosecution" (Finding 18, Pet. 17A.)

The claim for damages is based on the allegation that Willkom ordered the prosecution to continue. If, as contended now by Petitioner Cameo, Willkom did no more than influence someone else to continue the prosecution, there would be no basis for a claim at all. Willkom admits and acknowledges that he ordered the prosecution to continue as alleged by Petitioner Cameo in the complaint.

Petitioner Cameo also contends that prosecutorial immunity should not be available to Willkom because he is not a

lawyer. This Court has afforded absolute immunity to persons on the basis of whether their actions are functionally prosecutorial without regard to whether or not they are attorneys. In Butz v. Economou, this Court, in a general comment about the likelihood that prosecutors would generally act properly, noted that "[a]dvocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court" (Id. at 512).

It is a long way from this language to a conclusion that a person acting functionally as a prosecutor is not afforded immunity because he does not have a license to practice law. In Butz v. Economou, this Court distinguishes three types of functions in the

administrative process where absolute immunity would attach: 1) the decision maker or quasi-judicial actor; 2) the agency official who makes the decision to "move forward" with the proceedings, and 3) the agency attorney who actually presents the evidence. (Id. at 516).

Willkom clearly fits into the second category, as an agency official who makes the decision to move forward, to continue the administrative proceedings. There is nothing in Butz v. Economou that would limit the protected agency officials to those with law degrees. It is not unusual for the agency heads responsible for making the decision to go forward to be non-lawyers. It is the functional role that they perform, not the chance of their schooling or licensure that determines immunity.

III. THERE WERE ADEQUATE LEGAL REMEDIES AVAILABLE UNDER THE WISCONSIN ADMINISTRATIVE CODE AND COURT SYSTEM TO JUSTIFY THE IMMUNITY OF WILLKOM.

Petitioner Cameo contends that the administrative procedures were not sufficiently independent to allow the grant of immunity. Petitioner Cameo cites in support of that proposition cases concerning the independence of the decision maker.

The Wisconsin Administrative Code, chapter 227 Wis. Stats., provides for impartial hearing examiners, sec. 227.09(6), (Resp. Ap. 16A.) Wis. Stats., formal proceedings, sec. 227.07 Wis. Stats. (Resp. Ap. 11A.) , and judicial review, sec. 227.15 Wis. Stats. (Resp. Ap. 17A. and 18A.) These procedures, available under the Administrative Code, are in addition to the procedures that were also provided in sec. 50.04, Wis.

Stats. The Wisconsin court system, of course, is also available as a check or remedy against excessive agency zeal. Under Wisconsin decisions, agency action will be set aside if there is even the appearance of a lack of decisional impartiality Guthrie v. WERC, 111 Wis. 2d 447, 331 N.W.2d 331, 334-335 (1983).

The issue in this case, however, involves prosecutorial immunity of the official who decides that the case should go forward. The prosecutor is not expected to be independent in the sense that the hearing examiner should be, and in Butz v. Economou this Court noted that the check on the excessive zeal of such an official was in the availability of legal remedies. The Wisconsin Administrative Code provides not only for

formal decisions and judicial review, but also allows additional proceedings in the court hearing the review (sec. 227.19, Wis. Stats.). The district court found that there were sufficient checks, and in particular found that the process provided for judicial review. See Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983). This ruling was in accordance with Butz v. Economou.

IV. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner Cameo asserts that the court of appeals decision is in conflict with the decision of this Court in Pulliam v. Allen, ____U.S.____, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). Petitioner contends that it brought its claim for

injunctive and declaratory relief as well as for damages. This contention is totally frivolous.

Although the complaint contained a general request for a declaratory judgment, the prayer does not contain any claim for injunctive relief. (Pet. 35A.) Nor does the body of the complaint assert any basis for injunctive relief. At the time that the complaint was filed, Willkom was no longer deputy secretary of the Department. (Pet. 27A.) The complaint specifically alleged that the action was brought against Willkom individually and in his official capacity as "former Deputy Secretary." The complaint contains no allegations of any continuing function or

relationship that would in any way allow any claim for injunctive relief.

Not only does the Petition indicate that Willkom at the time of suit had no role in any of the activities complained of, but the statute providing for the listing on the suspension of referrals list had been repealed a year prior to the commencement of the action.

Neither in the district court or in the court of appeals did Petitioner Cameo assert a claim for injunctive relief.

V. CONCLUSION

The Petition contains no basis for certiorari. The decision of the court of appeals was directly in line with this Court's ruling in Butz v. Economou, and the extension of immunity to Willkom was

a simple application of settled law. The Petition for Review should be rejected.

Dated this 23rd day of April, 1985.

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SECTION 50.04 Wisconsin Statutes

50.04 Special provisions applying to licensing and regulation of nursing homes.

(1) APPLICABILITY. This section applies to nursing homes as defined in s. 50.01 (3).

(2) LICENSED ADMINISTRATOR REQUIRED. No nursing home within the state may operate except under the supervision of an administrator licensed under ch. 456 by the nursing home administrators examining board. If the holder of a nursing home license is unable to secure a new administrator because of the departure of an administrator, such license holder may, upon written notice to the department and upon the showing of a good faith effort to secure a licensed administrator, place the nursing home in the charge of an unlicensed individual subject to conditions and time limitations established by the department, with advice from the nursing home administrator examining board. An unlicensed individual who administers a nursing home as authorized under this subsection is not subject to the penalty provided under s. 456.09.

(2m) PLAN OF CARE REQUIRED. No nursing home may admit any patient until a physician has completed a plan of care for the patient. Failure to comply with this subsection is a class "B" violation under sub. (4)(b)2.

(3) INSPECTION REPORT. (a) Inspection. The department shall make or cause to be made at least one inspection annually of each nursing home in the state within 120 days prior to license issuance or renewal.

(b) Annual report. The department shall make at least one report on each nursing home in the state annually. All conditions and practices not in compliance with applicable standards within the last year shall be specifically stated. If a violation is corrected, is contested or is subject to an approved plan of correction, the same shall be specified in the annual report. The department shall send a copy of the report to the nursing home and shall provide a copy to any person on request. The department may charge a reasonable fee to cover copying costs.

(c) Posting of notice. The nursing home administrator

shall retain a copy of the most recent annual report prepared by the department under par. (b) and shall post in a place readily visible to residents and visitors, such as the lobby or reception area of the facility, a notice stating that a copy of the report is available for public inspection on request to the administrator and that a copy will be provided by the department upon request for a minimal fee.

(4) NOTICE OF VIOLATION; CORRECTION. (a) Notice of violation. If upon inspection or investigation the department determines that a nursing home is in violation of this subchapter or the rules promulgated thereunder, it shall promptly serve a notice of violation upon the licensee. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision or rule alleged to have been violated. The notice shall inform the licensee of the right to a hearing under par. (e) and of the provisions for placement of the nursing home on the list prepared under par. (d), if applicable. The written notice of a class "A" violation may be written and served by an agent of the

department at the time of the inspection.

(b) Classification of violations. 1. A class "A" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home presenting a substantial probability that death or serious mental or physical harm to a resident will result therefrom.

2. A class "B" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home directly threatening to the health, safety or welfare of a resident.

3. A class "C" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home which does not directly threaten the health, safety or welfare of a resident.

4. Each day of violation constitutes a separate violation. Except as provided

in sub. (5)(a) 4, the department shall have the burden of showing that a violation existed on each day for which a forfeiture is assessed. No forfeiture may be assessed for a condition for which the nursing home has received a variance or waiver of a standard.

(c) Correction. 1. The situation, condition or practice constituting a class "A" violation shall be abated or eliminated immediately unless a fixed period of time, as determined by the department and specified in the notice of violation, is required for correction. If the class "A" violation is not abated or eliminated within the specified time period, the department shall maintain an action in circuit court for injunction or other process against the licensee, owner, operator, administrator or representative of the facility to restrain and enjoin violation of applicable rules, regulations and statutes.

2. At the time of issuance of a notice of a class "B" or "C" violation, the department shall request a plan of correction which is subject to the department's approval. The nursing home shall have 15 days after receipt of notice of

violation in which to prepare and submit a plan of correction which is subject to the department's approval. The nursing home shall have 15 days after receipt of notice of violation in which to prepare and submit a plan of correction but the department may extend this period up to 30 days where correction involves substantial capital improvement. The plan shall include a fixed time period within which violations are to be corrected. If the nursing home plan of correction is substantially in compliance, it may be modified upon agreement between the department and the nursing home to achieve full compliance. If it rejects a plan of correction, the department shall send notice of the rejection and the reason for the rejection to the nursing home and impose a plan of correction. The imposed plan of correction may be modified upon agreement between the department and the nursing home.

3. If the violation has been corrected prior to submission and approval of a plan of correction, the nursing home may submit a report of correction in place of a plan of correction. Such report shall be signed by the administrator under oath.

4. Upon a licensee's petition, the department shall determine whether to grant a licensee's request for an extended correction time. Such petition must be served on the department prior to expiration of the correction time originally approved. The burden of proof is on the petitioner to show good cause for not being able to comply with the original correction time approved.

(d) Suspension of referrals. 1. The department shall prepare on a monthly basis a list containing the names and addresses of all nursing homes with existing class "A" violations as defined in par. (b) 1 or with 5 or more existing violations of any type, for which a plan of correction has been timely submitted to the department under par. (c), for which a plan of correction has been disapproved or for which an approved plan of correction has not been carried out. A copy of the monthly list of violators shall be sent to each county welfare director and each s. 51.42 or 51.437 board director in the county in which each nursing home listed is located. The department shall notify each nursing home placed on the list of such placement

at least 10 days prior to issuance of the list. No nursing home may be placed on the list unless a hearing has been held under par. (e) and a final determination has been made by the department or the time for requesting a hearing has passed and no request has been made. A nursing home shall be removed from the list when all corrections are made or when a plan of correction for all deficiencies is approved by the department. The list shall indicate those nursing homes which have been removed from the list during the prior month.

2. No county social services department or board under s.51.42 or 51.437 may refer persons to nursing homes on the list prepared under this paragraph.

3. No nursing home which is placed on the list prepared under this paragraph due to an existing class"A" violation or due to 5 or more existing class "B" violations may admit residents until it is removed from the list. Violation of this subdivision constitutes a class "B" violation.

4. The department may make exceptions to subd. 2 or 3 where there is a lack of facilities of the same type in

the area sufficient to satisfy the demand for the type of service provided by the home.

5. The department may provide information from the list to any agencies which make referrals to nursing homes.

(e) Hearings. 1. If a nursing home desires to contest any department action under this subsection, including rejection and imposition of a plan of correction, or suspension of referrals or admissions, it shall send a written request for a hearing under s. 227.07 to the department within 10 days of receipt of notice of the contested action. All agency action under this subsection arising out of violation or rejection and imposition of a plan of correction shall be the subject of a single hearing. The department shall commence the hearing within 30 days of the request for hearing, within 30 days of the department's acceptance of a nursing home's plan of correction or within 30 days of the department's imposition of a plan of correction, whichever is later. The department shall send notice to the nursing home in conformance with s. 227.07. Issues litigated at the hearing may not be relitigated at subsequent

hearings under this paragraph arising out of the same violation.

2. The department shall notify the nursing home of its decision to reverse, modify or uphold the contested action within 10 days after the close of the hearing.

SECTION 227.07 Wisconsin Statutes

Contested cases; notice; hearing; records.

(1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Except in the case of an emergency, reasonable notice shall consist of mailing notice to known interested parties at least 10 days prior to the hearing.

(2) The notice shall include:

(a) A statement of the time, place, and nature of the hearing, including whether the case is a class 1, 2, or 3 proceeding.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held, and, in the case of a class 2 proceeding, a reference to the particular statutes and rules involved.

(c) A short and plain statement of the matters asserted. If the matters cannot be stated with specificity at the time the notice is served, the notice

may be limited to a statement of the issues involved.

(3) Opportunity shall be afforded all parties to present evidence and to rebut or offer countervailing evidence.

(4) (a) In any action to be set for hearing, the agency or hearing examiner may direct the parties to appear before it for a conference to consider:

1. The clarification of issues.

2. The necessity or desirability of amendments to the pleadings.

3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

4. The limitation of the number of witnesses.

5. Such other matters as may aid in the disposition of the action.

(b) The agency or hearing examiner presiding at a conference under this subsection shall make a memorandum for the record which summarizes the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the

parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements of the parties. Such memorandum shall control the subsequent course of the action, unless modified at the hearing to prevent manifest injustice.

(5) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. In any proceeding in which a hearing is required by law, if there is no such hearing, the agency or hearing examiner shall record in writing the reason why no such hearing was held, and shall make copies available to interested persons.

(6) The record in a contested case shall include:

(a) All applications, pleadings, motions, intermediate rulings and exhibits and appendices thereto.

(b) Evidence received or considered, stipulations and admissions.

(c) A statement of matters officially noticed.

(d) Questions and offers of proof, objections, and rulings thereon.

(e) Any proposed findings or decisions and exceptions.

(f) Any decision, opinion or report by the agency or hearing examiner.

(7) All staff memoranda and staff data, not admitted as evidence in a contested case, which are submitted to the hearing examiner or officials of the agency in connection with their consideration of the case, are not part of the official record but shall be made a part of the file and shall be served on all parties. Any party may, within 10 days of service of such memoranda or data, submit comments thereon to the examiner or officials and such comments shall also be served on all parties and placed in the file.

(8) A stenographic, electronic or other record of oral proceedings shall be made in any class 2 or class 3 proceeding and in any class 1 proceeding when requested by a party. Each agency may establish rules relating to the transcription of the record into a written transcript and

the providing of free copies of the written transcript. Rules may require a purpose for transcription which is deemed by the agency to be reasonable, such as appeal, and if this test is met to the satisfaction of the agency, the record shall be transcribed at the agency's expense. Rules may require a showing of impecuniousness or financial need as a basis for providing a free copy of the transcript, otherwise a reasonable compensatory fee may be charged. If any agency does not adopt such rules, then it must transcribe the record and provide free copies of written transcripts upon request. In any event, an agency shall not refuse to provide a written transcript if the person making the request pays a reasonable compensatory fee for the transcription and for the copy. This subsection does not apply where a transcript fee is specifically provided by law.

(9) The factual basis of the decision shall be solely the evidence and matters officially noticed.

. . .

SECTION 227.09 Wisconsin Statutes

Hearing exmainers; examination of evidence by agency.

. . .

(6) The functions of persons presiding at a hearing or participating in proposed or final decisions shall be performed in an impartial manner. A hearing examiner or agency official may at any time disqualify himself or herself. In class 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a hearing examiner or official, the agency or hearing examiner shall determine the matter as part of the record and decision in the case.

SECTION 227.10 Wisconsin Statutes

Decisions.

Every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence. Every proposed or final decision shall include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.16. The agency shall by rule establish a procedure for determination of parties.

Section 227.15 Wisconsin Statutes

227.15 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

AFFIDAVIT OF TERRY WILLKOM

The subject of that discussion as related in the testimony, was a decision that I made and was within my authority as Deputy Secretary. The policy decision which in effect was designed to cause all Notices of Violation issued by surveyors to be tested through the administrative hearing process, and was directed at the Cameo Convalescent Center specifically, but was directed toward all matters pending adjudication and was made based upon all of the factors stated in the testimony which existed at that particular point in time.

TESTIMONY OF TERRY WILLKOM

. . . .

Q What did you say to him?

A General context of the conversation as I recall it would have been or was to the extent that at the time we were having a rather significant internal dispute as I understand it in the Bureau between the medically related personnel, i.e. the survey teams and the attorneys, and we were having a difficulty trying to get the two groups together in terms of dealing with the nurses, the pharmacists, the doctors relative to rules of evidentiary hearings and the attorneys to get more sensitive

to medical observation, medical record documentation, and trying to bring those two sides together. In that context Mr. Van de Grift represented one viewepoint; a number of the survey staff represented another. So our context and discussion there was his opinion that a number of citations that were taking place he was having difficulty from a legal standpoint supporting in the hearing process. So we were having generalized discussions around that I think relative to some other experiences that we were having at that time, Hearthside, Walworth County. There was a variety of facilities.

. . . .

Q Did you ever change the policy that once a notice of violation was issued, it was to be pursued regardless of merit?

MR. HOORNSTRA: Objection to the question because I don't think he said it was to be pursued regardless of merit.

Q Regardless of whether it was supportable or not?

A I was not able to get convincing evidence from either side as to what was or was not supportable. In the early stages of the implementation of Chapter 50, it was obvious to me that it was in the eyes of the beholder, that it was an opinion. And we did review history in terms

of our experience as we gained that over a period of time.